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No. 73-513

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

EDGARDO TORRALVO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that comments by the government improperly discouraged a co-defendant from testifying in his behalf and that the court erred in admitting evidence of transactions of a co-defendant similar to those with which petitioner was charged.

Petitioner and the co-defendant, Contreras, were charged with various offenses arising out of the use of false documents for immigration purposes. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count (count six) of a nine-count indictment[1] charging

[1]Counts seven and eight, charging petitioner with possessing and transferring a Selective Service System Notice of Classification for purposes of false identification, in violation of 50 U.S.C. App. 462(b)(1) and (2), were dismissed prior to trial.

Co-defendant Contreras was also charged in counts one and six with making a false statement in an application for a passport, in

conspiracy to sell false documents to aliens, in violation of 18 U.S.C. 371 and 911. He was sentenced to six months' imprisonment. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The evidence showed that in August 1970 Roberto Rodolfo Leppe, a citizen of Guatemala illegally residing in this country, responded to an advertisement by one Dr. Zequeira in an attempt to regularize his immigration status (Tr. 64-66, 68-71). When Leppe arrived at the address listed in the advertisement, a travel agency, he met petitioner (Tr. 70, 72-75). Petitioner told Leppe that he could furnish a Department of Labor permit and that it would cost $600 (Tr. 70-75). Petitioner then gave Leppe a business card which read in part: "Immigration Consultants * * * Torralvo Enterprises, Inc., Edgardo Torralvo, President" (Tr. 75, 77).

In September 1970, Leppe returned to the agency, gave petitioner a $300 down payment, and was given a Torralvo Enterprises, Inc. receipt signed by petitioner (Tr. 78-81). In February 1971, upon petitioner's request, Leppe returned to the travel agency (Tr. 85-86). Petitioner took him to a second-floor office and told him that, for the amount previously discussed, he could get papers showing that Leppe was a citizen of this country (Tr. 86-87). Petitioner also told Leppe that he would change

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count two with submitting a false baptismal certificate with his passport application, in counts three and four with giving a false statement and submitting a false affidavit in support of another's application for a passport, in count five with conspiracy to sell false documents, and in count nine with perjury before the grand jury investigating this case, in violation of 18 U.S.C. 1542, 1001, 371, 911, and 1623. On December 5, 1972, Contreras pleaded guilty to counts one, five and nine. He was sentenced to two years' imprisonment on each count, the terms to run concurrently to each other and consecutively to a prior five-year state sentence.

his date of birth, drop the name Roberto, and change the spelling of his last name to "Lepe" (Tr. 86, 88-90). Three days later Leppe returned to the office, gave petitioner another $300, and received a Board of Elections card, a Selective Service System Notice of Classification, and a Commonwealth of Puerto Rico birth certificate, all in the name of "Rodolfo Lepe" (Tr. 87, 104-105, 108, 110-111, 119-120). Leppe then told petitioner he would like to get similar papers for his common-law wife (Tr. 65, 106, 146).

Approximately two weeks after Leppe received the papers, petitioner told Leppe that he was leaving the country but that a Mr. Contreras would be able to obtain papers for Leppe's wife (Tr. 123). Thereafter Leppe met with Contreras in an attorney's office in the same building in which the travel agency was located (Tr. 123-128). Contreras told him that he had talked to petitioner about his case and took down information on Pricilla Montes Arteaga, Leppe's wife (Tr. 127-128, 136). He told Leppe that he would change her name and that her papers would be ready in a few days (Tr. 129, 149-150). Thereafter Leppe met Contreras at the agency, and later in Contreras' car, and paid $500 in return for a Board of Elections card, a Commonwealth of Puerto Rico birth certificate, and a baptismal certificate, all in the name of "Pricilia Montes" (Tr. 133-140, 147-148, 229).

In April 1971, Leppe and his wife "Montes," while returning from a trip to their home countries, attempted to use the documents received from petitioner and Contreras at the Miami Airport and were apprehended by immigration officers (Tr. 151-152, 157, 184).

The evidence at trial further showed that co-defendant Contreras had used a false baptismal certificate in 1967, when he applied for a United States passport (Tr. 190, 340-341), had filed a false affidavit swearing that one

Rafael Angulo was a United States citizen and had furnished a false baptismal certificate in support of Angulo's application for a passport (Tr. 12-20, 40-45, 51-60, 191), and had furnished a Puerto Rican birth certificate to one Maria Elena Curto, a citizen of Peru (Tr. 344, 357, 360, 372-375).

1. At the close of the government's evidence, petitioner's counsel told the court that he would "call Mr. Contreras to the stand to ask him questions pertaining to his relationship with" petitioner (Tr. 425). The prosecutor then moved to dismiss the outstanding count against Contreras, but noted (Tr. 427-428):

> [I]f Mr. Contreras makes any statement on the witness stand which is in itself perjurious, or which discloses that he committed perjury before the grand jury, the government will prosecute him for that. If he discloses evidence of any offense which is not the subject of this indictment on the witness stand, the government will prosecute him for that.
>
> He is not getting an immunity because count 6 has been dismissed. I am sure that is perfectly clear, but I don't want any recriminations afterward.

Petitioner's contention that the above comments by the government violated his right to elicit exculpatory evidence is without merit. One week prior to trial, the government had advised the court and petitioner's counsel that Contreras had told the government that he had given Leppe his wife's New York City Board of Elections card and Commonwealth of Puerto Rico birth certificate but denied any knowledge of Leppe's Selective Service System Notice of Classification. At that time, Contreras' attorney stated that Contreras would assert his Fifth Amendment privilege if called, and this was

understood by petitioner's counsel (Tr. 306-308; Transcript of December 5, 1972, pp. 18-19). The government's truthful statement of the consequences of perjury denied no right of petitioner. See *United States* v. *Sclafani and Ross,* C.A. 2, Nos. 73-1017, 73-1048, decided June 27, 1973, certiorari denied, November 12, 1973, Nos. 73-196, 73-351.

2. Petitioner's additional contention that it was prejudicial error to admit evidence that co-conspirator Contreras had used and furnished false documents, including a Saint Luke's Church baptismal certificate and a Puerto Rican birth certificate, is without merit. The evidence was admissible to corroborate Leppe's testimony that he had obtained a Saint Luke's Church baptismal certificate from Contreras for his wife and a Puerto Rican birth certificate from petitioner for himself. It also was admissible to show that illegal documents were being furnished from petitioner's office and that petitioner had the opportunity and was equipped to commit the offense charged. See *United States* v. *Fisher,* 455 F. 2d 1101, 1104 (C.A. 2); *United States* v. *Baker,* 419 F. 2d 83, 86-87 (C.A. 2), certiorari denied *sub nom. Acunto* v. *United States,* 397 U.S. 971.

Under these circumstances, "the task of weighing possible unfair prejudice against probative value rests with the sound discretion of the trial judge and 'his determination will rarely be disturbed on appeal.'" *United States* v. *Fisher, supra,* 455 F. 2d at 1103 (citing *United States* v. *Ravich,* 421 F. 2d 1196, 1204 (C.A. 2)).[2]

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[2]In *Ravich* the Court held that, while acts subsequent to the conspiracy charged were not admissible, proof of the possession of the means used to commit a crime at a time after its commission entitled the jury to infer possession of those means at the time of the offense.

Here, petitioner has made no showing that the trial court abused its discretion in admitting the evidence. Moreover, the court gave the following cautionary instructions regarding the limited purpose of the evidence (Tr. 775-777):

> Well, you say, Judge, what about that evidence dealing with Miss Curto and Angulo? Is that a part of this conspiracy? If so, is it binding on this defendant? And if it is not binding on him, why did you let it into evidence?
>
> Let me say right off that the testimony with regard to Curto and Angulo is not binding on this defendant. Now I will undertake to explain to you why the law nevertheless permits it to be admitted.
>
> You recall that the indictment charges a specific conspiracy between Torralvo, Contreras, Leppe and Montes involving the furnishing of fraudulent documents to Leppe by Torralvo and Contreras.
>
> Under the instructions I have just given you if you find beyond a reasonable doubt that there was such a conspiracy, that it had as a purpose the violation of Section 911 of the United States Code, and that Torralvo was a member of the conspiracy, then Torralvo is criminally responsible for the actions of all of the other members of the conspiracy in furtherance of that particular specific conspiracy as charged in the indictment, and no other.
>
> However, you have also heard evidence which you may or may not find shows the involvement of Contreras with the witness Curto and with a person named Rafael Angulo.
>
> There was also evidence regarding Contreras' own application for a United States passport. The indict-

ment does not charge, nor does the government contend, that any of these acts by Contreras were a part of the conspiracy with which it is charged Torralvo was involved.

These acts involving Curto and Angulo cannot be imputed by you to Torralvo under any circumstances whatever. This evidence, however, may be considered by you only as corroboration of the testimony of the witness Leppe, or as establishing an opportunity, or preparation to commit the specific crime charged in the indictment. And that is a conspiracy between Torralvo, Contreras, Leppe and Montes involving the furnishing of fraudulent documents to Leppe by Torralvo and Contreras. What weight you give to this evidence is, as with any evidence before you, entirely for your determination.

The risk that the jury would transfer Contreras' guilt to petitioner, for transactions not involving petitioner, was minimal in light of these specific and thorough instructions. See *Blumenthal* v. *United States,* 332 U.S. 539, 560.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1973.